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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMETRIUS MANNING,

Defendant and Appellant.

D074891

(Super. Ct. No. FSB1405406)

APPEAL from a judgment of the Superior Court of San Bernardino County, J.

David Mazurek, Judge. Affirmed as modified.

Christopher Allan Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Melissa Mandel, Meredith S. White and Mary Katherine Strickland, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Demetrius Manning of forcible rape (Pen. Code,<sup>1</sup> § 261, subd. (a)(2); count 1), false imprisonment by violence (§ 236, subd. (a); count 2), human trafficking to commit another crime (pandering) (§ 236.1, subd. (b); count 3), criminal threats (§ 422; count 4), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 5); and kidnapping to commit rape (§ 209, subd. (b)(1); count 6). The trial court found true allegations that Manning had two prior strike convictions (§§ 667, subd. (b), 1170.12). It sentenced Manning to a total indeterminate prison term of 185 years to life in prison, consisting of consecutive terms of 25 years to life on counts 1, 2, 4, 5, and 6, and 60 years to life on count 3.

On appeal, Manning contends: (1) the court prejudicially erred in instructing the jury as to the count 3 charge of human trafficking to commit another crime because the jury instruction omitted the specific intent requirement, which violated his Fifth and Fourteenth Amendment rights to due process; (2) this court should reverse his count 2 conviction for false imprisonment because it is a necessarily included offense of kidnapping for rape; and (3) whether or not his count 3 conviction is reversed, under section 654 he should be sentenced for only one of the crimes in counts 1, 2, and 4 through 6 and the remaining sentences should be stayed because the crimes were an indivisible course of conduct, incident to the single objective of human trafficking.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

The People concede that the court's instruction as to human trafficking was erroneous, but argue the error is harmless beyond a reasonable doubt. They further agree that Manning's count 2 felony false imprisonment conviction is a lesser included offense of kidnapping for rape, and concede the count 2 conviction should be vacated. The People concede that the court should have stayed under section 654 Manning's sentence on the count 6 conviction for kidnapping for rape, however, they argue the court properly imposed consecutive sentences on counts 1, 3, 4 and 5 because the evidence showed distinct acts of assault likely to produce great bodily injury and criminal threats, as well as distinct reasons for Manning's commission of rape and human trafficking. We agree the judgment should be modified to vacate Manning's conviction for felony false imprisonment and stay under section 654 Manning's sentence for kidnapping for rape. As so modified, we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In early 2013, Jane Doe, who was then 22 years old, was homeless and staying with friends in an abandoned house in San Bernardino County. She was using drugs at the time. On January 7, 2013, she met Manning while visiting a friend a few blocks away. Manning, who was introduced to Doe as "Stacks," offered to help Doe, a musician, record her music and told her he had a studio. Doe's friend urged her to leave with Manning, and though Doe initially did not want to, she eventually left with him and they walked to his house. When they arrived, Doe saw two others at the house trying to sleep. Manning asked Doe to get in the shower and offered her methamphetamine, which she refused because she did not want to have sex with him or owe him anything. Doe

was standoffish and took "quite a bit of an attitude," asking Manning where his studio was and pointing out there was no studio. Doe finally said, "This is bullshit," and walked out.

According to Doe, Manning "felt disrespected in front of his friend" and after she had walked about a half block, he chased after her, slammed her against a metal gate, pulled her hair, choked her, and said, "I should shoot your ass."<sup>2</sup> Manning then dragged her back to the house into an empty back room, where he closed the door and told her to take her clothes off. Doe did so because he was "smacking" her and pulling her hair. Manning raped Doe while slapping her. He told Doe not to look anyone else in the eye, that he owned her, and that her new name was "Treasure." While continuing to hit Doe, Manning told her he would kill her and she "had to make him money and . . . how much money to make." Doe responded to this by telling Manning she would give him all of it; according to Doe, she "said what [she] thought . . . he wanted to hear" because she had "never been a prostitute." Manning also told Doe, "[I]f anybody asks you, you just tell them—tell them you work for Stacks." Manning hit Doe a couple of times and demanded she tell him her name, to which Doe said, "Treasure." Manning forced Doe to orally copulate him while he continued to slap her in the face. He also made her rub her breasts on his penis, but according to Doe he got upset with her because she "wasn't

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<sup>2</sup> Exhibit 12 was Doe's handwritten account of the incident written on January 7, 2013. In it, Doe wrote that after she walked out of the house, Manning "(2) slammed me up against the fence, (2) pulled my hair, (3) choked me out with his hands, (4) told me he owned me now, (5) said he might shoot me right then, [and ] (6) drug [*sic*] me back in the house, then to an empty room" where he committed the additional offenses.

doing it right . . . ." Doe complied because she did not want Manning to hurt her more than he already had; she believed his threats and thought it would not be a good idea to tell him to stop. Doe did not believe Manning ejaculated; she thought "he was more just trying to show me what was up, teach me a lesson." She recalled telling a responding police officer that at some point, Manning choked her and she begged, "Please. I'm sorry. I'll respect you." After a while,<sup>3</sup> Manning stopped, left the room and closed the door. Doe dressed as fast as she could and jumped out of the window.

Between about 6:00 and 6:30 that morning, a neighbor, G.A., saw Manning leave the house and Doe jump out of the window. Doe ran to G.A. for help. G.A. told her it would be okay; that Manning had done this before and she was "tired of his crap." G.A. took Doe to the train station, bought her a ticket to San Diego, and gave her some money. She also called police, who found Doe and pulled her off the train to speak with her. Doe underwent a sexual assault exam and wrote a statement describing the incident to police. She identified Manning out of a photographic lineup.

At trial, a sexual assault nurse who examined Doe after the incident testified she had checked Doe's entire body but did not see bruising on Doe or visible injuries. She observed that Doe had a superficial tear in the base of her vaginal opening, which was consistent with Doe's description of the incident, though the nurse could not tell if it resulted from consensual or nonconsensual activity. The nurse made no findings for the

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<sup>3</sup> Doe could not recall how much time passed during the incident. When asked how long the attack went on, she said, "Probably like 20 minutes. I don't know."

interior of Doe's vagina and cervix, or for Doe's buttocks, anus or rectum, but according to the nurse, the absence of findings did not negate an actual rape. Doe did not report she was told she would be working for Manning, or that Manning had given her the name Treasure.

The People presented testimony from L.S., who lived at the house where Doe was raped. L.S. did not have a good relationship with Manning; he felt they were "like, enemies." L.S. recalled Manning and Doe showing up at the house on the evening of January 7, 2013. At about 6:00 the next morning L.S. saw Doe, who was unclothed and looked scared, run out of the house with Manning chasing her. According to L.S., Manning caught Doe and returned her to the back room of the house. L.S. recalled Manning yelling at Doe and trying to make Doe "do things that she didn't want [to do]." Doe then jumped out of the window and went to the neighbor's house.

In closing arguments to the jury, Manning's counsel asserted that Doe was lying about the entire incident: she lied about being beaten because she had no scratches, bruises or other injuries; she lied about being dragged to Manning's house because no hair was found in the house; there was no gun or knife; and no evidence suggested Manning was a pimp.

## DISCUSSION

### *I. Instructional Error as to Count 3*

At trial, the court instructed the jury as to the count 3 human trafficking charge in part as follows:

"To prove that the defendant is guilty of [human trafficking in violation of Penal Code section 236.1], the People must prove that:

"One. The defendant either deprived another person of personal liberty or violated that other person's personal liberty;

"And two. When the defendant acted, the other person intended to commit a felony violation of 266(i)."<sup>4</sup>

The court then instructed the jury on pandering in part as follows:

"To prove that the defendant is guilty of pandering, in violation of Penal Code section 266(i), the People must prove that:

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<sup>4</sup> Manning did not object to the court's instruction in this regard, but "it is settled that a defendant need not object to preserve a challenge to an instruction that affects his substantial rights." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1164, disagreed with on other grounds in *People v. Martinez* (2017) 8 Cal.App.5th 298, 304-306; see also *People v. Mackey* (2015) 233 Cal.App.4th 32, 106; § 1259.) Because Manning contends the court's instruction removed an element of the offense from the jury's consideration, the instructional error affected his substantial rights. (Accord, *Valenti*, at p. 1164.) We therefore review the issue de novo despite his failure to object below. The court's instruction continued: "Depriving or violating another person's personal liberty, as used here, includes substantial and sustained restriction of another person's liberty accomplished through force, fear, violence, duress, menace, or threat to the victim or to another person under circumstances in which the person receiving or perceiving the threat reasonably believes that it is likely that the person making the threat would carry it out. [¶] Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person to do or submit to something that he or she would not otherwise do or submit to. [¶] Violence means using physical force that is greater than the force reasonably necessary to restrain someone. [¶] Menace means a verbal or physical threat of harm, including use of a deadly weapon. The threat of harm may be express or implied. [¶] When you decide whether the defendant used duress or used coercion or deprived another person of personal liberty or violated that other person's personal liberty, consider all of the circumstances, including the age of the other person, her relationship to the defendant, and the other person's handicap or disability, if any."

"One. The defendant used threats, violence or any device or scheme to cause Jane Doe to become a prostitute, although the defendant's efforts need not have been successful;

"And two. The defendant intended to influence Jane Doe to be a prostitute."<sup>5</sup>

Manning contends the trial court's instruction as to human trafficking omitted the essential element of his specific intent, because it referred to the "other person" as intending to commit pandering ("a felony violation of section 266i"). He maintains the error violated his constitutional right to due process and was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), viewing the evidence in the light most favorable to him. Manning argues: "[A]lthough there was evidence showing that appellant deprived Jane Doe of her personal liberty, the evidence that appellant had the specific intent to pander Doe was less clear. Doe was not a prostitute and there is no evidence that she told appellant that she had ever worked as a prostitute. After assaulting Doe, appellant simply left the room . . . , which seems inconsistent with the specific intent to make Doe his prostitute."

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<sup>5</sup> This instruction was for pandering within the meaning of section 266i, subdivision (a)(2). That instruction continued: "A prostitute is a person who engages in sexual intercourse or any lewd act with another person in exchange for money or other compensation. Pandering requires that an intended act of prostitution be with someone other than the defendant. A lewd act means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification. [¶] Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that would cause a reasonable person to do or submit to something that he or she would not do or submit to otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the person's age and her relationship to the defendant."



The People concede the instructional error, but maintain it did not contribute to the jury's verdict and thus was harmless beyond a reasonable doubt in view of the court's other instructions, the prosecutor's arguments, the verdict forms, and the fact the erroneous instruction made Manning's conviction less likely, causing no prejudice.

The court's failure to instruct the jury on the element of the defendant's intent was indeed constitutional error. The crime of human trafficking under section 236.1 encompasses a defendant's act of depriving or violating the personal liberty of another with the intent to violate one of several specified Penal Code provisions. (*People v. Shields* (2018) 23 Cal.App.5th 1242, 1248-1249, citing § 236.1, subd. (b).) Here, the instruction asked the jury to find the other offense was a felony violation of section 266i, the offense of pandering, which itself is a specific intent crime. (*People v. Zambia* (2011) 51 Cal.4th 965, 980; *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1256.)

"The trial court has a sua sponte duty to instruct the jury on the essential elements of the charged offense." (*People v. Merritt* (2017) 2 Cal.5th 819, 824.) The court's failure to do so is "very serious constitutional error because it threatens the right to a jury trial that both the United States and California Constitutions guarantee" and the defendant's "right to 'a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " (*Ibid*; see also *People v. Gonzalez* (2018) 5 Cal.5th 186, 198-199 ["When a court fails to instruct the jury on an element of an offense, the error violates the federal Constitution because a jury must find the defendant guilty of every element of the crime of conviction beyond a reasonable

doubt"]; *People v. Haley* (2004) 34 Cal.4th 283, 314 [mistaken instruction that crime required general not specific intent is federal constitutional error].)

The court in *People v. Valenti, supra*, 243 Cal.App.4th 1140 set forth the applicable prejudice analysis in these instances: "We assess federal constitutional errors under *Chapman*[, *supra*, 386 U.S. 18]. Under *Chapman*, we must reverse unless the People 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citation.] Where the trial court fails to instruct on an element of the charged offense, however, the People must make a more substantial showing. That showing is governed by *Neder v. United States* (1999) 527 U.S. 1, 17-19 . . . (*Neder*), and by the California Supreme Court's decision [in *People v. Mil* (2012) 53 Cal.4th 400] interpreting *Neder* . . . . [¶] '*Neder* instructs us to "conduct a thorough examination of the record. If, at the end of that examination [we] cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[we] should not find the error harmless.'" ' [Citation.] On the other hand, the error is harmless if the People can prove beyond a reasonable doubt that the omitted element was uncontested and supported by such overwhelming evidence that no rational juror could come to a different conclusion." (*Valenti, supra*, 243 Cal.App.4th at pp. 1165-1166, quoting *People v. Mil, supra*, 53 Cal.4th at p. 417.) "[U]nder *Mil*, we must determine whether there is substantial evidence supporting a *contrary* finding on the omitted element. [Citation.] We therefore review the evidence in the light most favorable to defendant; we may not reweigh the

evidence or resolve evidentiary conflicts." (*Valenti*, at pp. 1166-1167; see also *People v. McCloud* (2017) 15 Cal.App.5th 948.)

Even viewing the evidence in the light most favorable to Manning under the above standard, we are compelled to conclude that the instructional error here was harmless beyond a reasonable doubt. Notably, the defense theory in closing was not that Manning did not try to make Doe work for him as a prostitute, but that Doe was lying about being raped and beaten at all. In fact, defense counsel suggested that Doe *was already* a prostitute, and may have been having consensual sex and negotiating with Manning in that respect.<sup>6</sup> On appeal, Manning simply contends that the evidence of his intent to make Doe a prostitute was weak, suggesting the jury could have inferred he had no such intent. We disagree about the state of the evidence; it shows without contradiction that

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<sup>6</sup> In part, defense counsel stated: "[Doe] is street smart. She's been living on the streets for years. She's been up and down the coast—in Portland, in San Diego and Orange County and LA and here, which is kind of similar to what Officer Jones said about what prostitutes do. There's a circus—circuit. There's a circuit. [¶] Now, again, even if she was a prostitute, I'm not saying she deserved this, she had it coming or asked for it. . . . [¶] . . . [¶] She told—her story was that this happened at 1:00 in the morning and then 6:00 in the morning and then 4:00 in the morning. And it's true, what time it happened doesn't matter. What matters is there was about six hours when these people were together. What were they doing? She told the SART nurse this thing happened at 4:30 in the morning. She came out the window; it was almost 7:00. What was she doing? Was she doing drugs? Maybe. Were they hanging out? Maybe. Were they—did they have consensual sex and then get into an argument afterwards about what was—negotiations or whatever else was happening? Maybe. The problem is we don't know. But we know her story is not true . . . ." Counsel argued: "How reasonable is [Doe's] testimony that she was being beaten when there's no injuries? How reasonable is it that she would have perfectly, innocently gone to this house in the middle of the night with intentions to record music? I think that hearing what she has to say about this culture and the drug culture, I think it's quite possible there was a lot more going on than what she was saying."

Manning sought to make Doe work for him, even giving her a different name, telling her she had to make money for him, and forcing her to do sex acts on him to "teach [her] a lesson." There is no basis to determine, in accordance with *People v. Mil*, *supra*, 53 Cal.4th 400, that the record " 'contains evidence that could rationally lead to a contrary finding with respect to' " Manning's intent to commit pandering. There is no such evidence and defense counsel points to none.

On this record, we conclude no reasonable juror could have failed to find Manning lacked the intent to commit pandering; that he did not use threats or violence in order to cause Doe to become a prostitute, and intended that his conduct influence her to do so. Instructional error on the issue of intent or mental state may be deemed harmless when the factual question is necessarily resolved by the jury on other instructions. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 899; *People v. Stewart* (1976) 16 Cal.3d 133, 141; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165.) Here, the court broadly instructed the jury that the crime of human trafficking to commit another crime was a "specific intent" crime, additionally stating: "For you to find a person guilty of these crimes, that person must not only intentionally commit the prohibited act, but must do so with a specific intent." Further, the court's instruction on the crime of pandering, given immediately after the erroneous instruction, expressly told the jury it was required to find Manning "used threats, violence or any device or scheme to cause Jane Doe to become a prostitute," and "intended to influence Jane Doe to be a prostitute." The prosecutor argued Manning's intent extensively in her closing argument, making clear that for human trafficking the jury was to find that "when the defendant acted, he intended to

commit a violation of pandering . . . ." She argued: "In this case [Manning] deprived Jane Doe of her liberty. He held her against her will. He threatened her and raped her. When he did that, he intended to commit a violation of pandering. That's the other offense. And in this case when you consider this particular charge, you consider all of the circumstances in this case including Jane Doe's disability, any mental health issues. And we don't have to prove that she actually went to work for him as a prostitute; merely that that's what he intended to do, and that's what he tried to do on that particular day."<sup>7</sup> When the jury found Manning guilty of human trafficking to commit pandering, it necessarily found *he*, not some other person, intended to commit pandering and had the specific intent to do so. In view of the entire record, the jury could not have misunderstood the instructions in a way that would have permitted it to find some other

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<sup>7</sup> The prosecutor continued: "For pandering—it's kind of a weird term. It sounds almost like you'd hear about pandering back in the old days like people looking for money and things like that. In this particular case, pandering is the recruitment of someone of somebody to work as a prostitute for you. [¶] So, the defendant used threats, violence, et cetera, to cause the victim to become a prostitute. They don't have to be successful at making that person a prostitute. [¶] Defendant intended to influence the victim to be a prostitute. We don't have to prove a completed act. And it doesn't matter for this particular case whether or not Jane Doe was already a prostitute. You don't have any evidence that she was. But if you thought she was, it doesn't matter for this particular charge. [¶] He raped her and threatened her to try to get her to work as a prostitute. Again, doesn't need to be successful. [¶] What things show us that he was trying to get her to work as a prostitute? Well, we know that he told her her name is going to be 'Treasure.' 'You work for me.' 'I get the money.' 'Don't look other Black men in the eye.' [¶] And we know from Officer Jones's expert testimony in this case that those are the things that pimps tell girls when they go to work for them: 'Don't look at other Black men.' The pimps are the ones that get all of the money. They don't use their regular name when they work as a prostitute. All of those things are circumstantial evidence that the defendant was attempting to have Jane Doe work as a prostitute for him. And, again, we do not have to prove a completed act for this."

unidentified person had that intent, and could not have relied on evidence of Manning's contrary intent as there was none, making the error harmless beyond a reasonable doubt.

## II. *Felony False Imprisonment as a Lesser Included Offense to Kidnapping for Rape*

Manning contends his count 2 conviction for felony false imprisonment must be reversed because it is necessarily included in the count 6 offense of kidnapping for rape. The People concede that the count 2 conviction must be reversed under the statutory elements test (see *People v. Robinson* (2016) 63 Cal.4th 200, 207),<sup>8</sup> and we agree.

The crime of felony false imprisonment (false imprisonment effected by violence, menace, fraud or deceit) is a lesser included offense of kidnapping for rape. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 362; see also *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121 [felony false imprisonment and kidnapping]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233 [false imprisonment is a lesser included offense of aggravated kidnapping].)

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<sup>8</sup> "To ascertain whether one crime is necessarily included in another, courts may look either to the accusatory pleading or the statutory elements of the crimes. When, as here, the accusatory pleading incorporates the statutory definition of the charged offense without referring to the particular facts, a reviewing court must rely on the statutory elements to determine if there is a lesser included offense. [Citation.] 'The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words, " [i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " ' [Citation.] Nevertheless, if the *same* evidence is required to support *all* elements of both offenses, there is no lesser included offense. [Citation.] Each is its own offense, based on different statutes that apply to the same conduct; neither can be said to be a lesser of the other." (*People v. Robinson, supra*, 63 Cal.4th at p. 207.)

If both the false imprisonment count and the kidnapping count are based on the same act or course of conduct, a defendant cannot be convicted of both offenses. (See *People v. Sanders* (2012) 55 Cal.4th 731, 736.) "The law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct." (*People v. Milward* (2011) 52 Cal.4th 580, 589; see also *People v. Delacerda* (2015) 236 Cal.App.4th 282, 291 ["convictions for both a greater and a lesser included offense based upon the same conduct are always prohibited"]; *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 820 ["If both the false imprisonment count and kidnapping count relate to the same act, double conviction as well as double punishment is prohibited"].) Here, Manning was found guilty of both kidnapping for rape and false imprisonment based on his conduct in dragging Doe back to a room in the house, closing the door and threatening to kill her, then raping her. The greater kidnapping for rape offense is controlling, and the conviction of the lesser felony false imprisonment offense must be reversed. (*Sanders*, at p. 736.)

III. *The Trial Court Did Not Err by Imposing Consecutive Sentences on Counts 1, 3, 4 and 5*

During Manning's sentencing hearing, defense counsel requested that Manning's offenses be sentenced concurrently rather than consecutively, asserting the offenses arose out of the same course of conduct, and that consecutive sentences would be cruel and unusual. The court declined to do so "based upon the nature of the crimes that were committed [and] the duration of the crimes," finding, "It wasn't just one act. It was multiple acts over a period of time."

Manning contends the court erred by failing to stay under section 654 his sentences on his convictions for forcible rape, criminal threat and assault, because all arise from the "same set of operative facts" and were incident to the objective of committing human trafficking. He argues that even if we reverse the count 3 human trafficking conviction, he may only be punished for one of the five remaining offenses. Pointing to the prosecutor's closing arguments, Manning asserts "the People's *entire theory of the case* was that every one of the offenses were committed with the same objective and intent: to commit human trafficking," and thus the evidence supports only the conclusion that the crimes were incident to one objective and the encounter an "indivisible transaction, with all the offenses joined by a common intent." According to Manning, aggravated trafficking should be considered a continuing offense that is committed by a series of acts with a cumulative criminal effect, and thus section 654 should apply to any separate offenses committed with the intent and objective to accomplish the restriction of liberty during the offense. He argues: "Instances of 'force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person' under section 236.1, subdivision (h)(3) are—for the purposes of section 654—'incidental to, or . . . the means of accomplishing or facilitating one objective,' . . . , namely, the objective of trafficking."

The People concede that Manning's count 6 conviction of kidnapping for rape is incidental to his count 1 conviction for rape, and that the court should have stayed Manning's sentence on count 6 under section 654. However they argue the evidence shows Manning committed distinct acts of assault and criminal threats via conduct that



was divisible in time, and that he committed the kidnapping for rape and trafficking for "different reasons—to sexually satisfy himself, and to force the victim to work as a prostitute." Thus, the People maintain that even if human trafficking is a continuing offense, substantial evidence supports imposition of consecutive sentences for the assault, criminal threats and human trafficking convictions.

#### A. *Legal Principles*

Though Manning did not expressly object on section 654 grounds in the trial court, a sentence imposed in contravention of that statute is unauthorized, and the error may be raised on appeal in the absence of an objection. (*People v. Kelly* (2018) 28 Cal.App.5th 886, 903, citing *People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Leonard* (2014) 228 Cal.App.4th 465, 498.)

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." The section bars imposition of multiple punishments where one act or an indivisible course of conduct violates more than one statute. (*People v. Correa* (2012) 54 Cal.4th 331, 336-337, 340-341; *People v. Perez* (1979) 23 Cal.3d 545, 551.) The purpose of this protection is to ensure that the defendant's punishment is commensurate with his criminal culpability. (*People v. Capistrano* (2014) 59 Cal.4th 830, 886.)

"Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives. [Citations.] At step one, courts examine the facts of the case to determine whether multiple convictions are based upon a single physical act. [Citation.] When those facts are undisputed . . . the application of section 654 raises a question of law we review de novo." (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312.)

If the pertinent facts are in dispute, "[i]ntent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense." (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) The court's implicit or express determination in that respect will be upheld on appeal if supported by substantial evidence. (*People v. Capistrano, supra*, 59 Cal.4th at p. 886 & fn. 14 [appellate court may affirm the trial court's ruling, if supported by substantial evidence, on any valid ground]; *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005.) We review the court's determination in the light most favorable to the People and presume the existence of every fact the court could reasonably deduce from the evidence. (*People v. Vang* (2010) 184 Cal.App.4th 912, 915-916.)

## B. Analysis

"Whether a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses." (*People v. Corpening, supra*, 2 Cal.5th at p. 313.) Aggravated assault occurs when a person uses "force likely to produce great bodily injury" upon another person. (§ 245, subd. (a)(4).) A criminal threat occurs when a defendant intentionally conveys an immediate threat of death or great bodily injury that causes sustained fear in the victim. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Forcible rape is "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, . . . [¶] . . . [¶] . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).) Human trafficking is the " '[d]eprivation or violation of the personal liberty of another' " with the intent to effect pimping, pandering, or procuring. (§ 236.1, subs. (b), (h)(3).)<sup>9</sup>

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<sup>9</sup> Section 236.1, subdivision (b), punishes one who "*deprives or violates the personal liberty of another* with the intent to effect or maintain a violation of" specified sex offenses such as pandering (§ 266i) by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than five hundred thousand dollars. (Italics added.) Subdivision (h) of section 236.1 provides: "For purposes of this chapter, the following definitions apply: [¶] . . . [¶] (3) 'Deprivation or violation of the personal liberty of another' includes substantial and sustained restriction of another's liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out." (§ 236.1, subd. (h).)

Using *Corpening's* standard, Manning's various offenses against Doe were not completed by a single physical act or indivisible course of conduct; they involved a series of acts in first the assault (slamming Doe against the gate), then the criminal threat (stating he would shoot her), then dragging Doe back to the house, where he raped her and forced her to commit other sex acts, telling her he owned her and demanding that she work for him under a new name. These actions were separated both physically and temporally, and the jury convicted him of distinct offenses based on these acts. Because the record shows a course of conduct rather than a single physical act, the court was required to consider Manning's intents and objectives. (*People v. Corpening, supra*, 2 Cal.5th at p. 312.) The court implicitly found Manning had separate and independent intents and objectives in his actions, warranting consecutive sentences for his assault against Doe, his threat, her rape and Manning's acts in seeking to traffic Doe.

We conclude substantial evidence in the record supports such an implied finding. (Accord, *People v. Brents, supra*, 53 Cal.4th at p. 618 [trial court's implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence].) Doe's testimony permitted the court to conclude that when Manning assaulted her after chasing and catching up to her, he intended to punish her for refusing to have sex with him, disrespecting him in front of others, and leaving the house. After assaulting Doe, Manning then completed a threat when he said he should shoot her, permitting an inference that Manning intended to instill fear in Doe and force her to submit to him. Manning then dragged Doe to the house, where he put her in the back room and proceeded to rape her. Given Manning's earlier unsuccessful efforts to get

Doe in a position to have sex with him, the court reasonably could conclude his act in raping her was done for the purpose of his own sexual gratification or as a form of punishment, apart from his intent to make Doe prostitute for him. While forcing Doe to commit this and other sex acts and forcibly slapping her around, Manning told Doe she would have to work and make money for him, thereby committing human trafficking. Manning certainly used violence, force and fear, apart from the rape, to restrain Doe's liberty for the purpose of pandering. That is, Doe's rape was not merely incidental to his efforts to traffic her. The court could properly have found that Manning's trafficking offense began in the back room of the house while he was forcing Doe to commit sex acts and telling her he owned her, that her new name was Treasure, and that she had to make him money.

That there may be overlap between Manning's rape of Doe and his efforts to traffic her does not defeat section 654's application. As Manning acknowledges, timing is not the definitive test for applying section 654 (see *People v. Capistrano*, *supra*, 59 Cal.4th at p. 886 [" 'It is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible' "], overruled on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 103-104), and the statute's prohibition on multiple punishment does not apply where a defendant has separate but simultaneous objectives. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Here, the record establishes discrete objectives manifested by distinct acts done at different times. There is no basis to conclude the court erred by

declining to stay all but one of the sentences on counts 1, 3, 4 or 5, or by consecutively sentencing Manning on those counts.

As the People point out, it is of no moment that the prosecutor may have suggested in closing argument that all of Manning's actions were "consistent with him trying to break [Doe], to make her work for him as a prostitute." The prosecutor's assertions during closing argument do not compel the application of section 654 to Manning's sentence. (*People v. Leonard, supra*, 228 Cal.App.4th at p. 500.) Her statements are not binding judicial admissions; they "are not evidence, and they are not binding on the . . . court." (*Ibid.*)

By our conclusions above, we necessarily reject Manning's attempt to characterize his offenses against Doe as based on the same set of operative facts with the sole purpose and objective of trying to break Doe and make her work for him as a prostitute. He argues that human trafficking has the "hallmarks" of a continuing offense: one that may be committed by " 'a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal.' " (See *People v. Sanchez* (2001) 94 Cal.App.4th 622, 632.) According to Manning, section 654 should apply to any separate offenses committed with the intent and objective to accomplish the " 'substantial and sustained restriction of liberty' " during the offense. Thus, Manning argues, any use of force, fear or violence under section 236.1 is incidental to or the means of accomplishing or facilitating one objective of trafficking for purposes of applying section 654.

These arguments ignore the evidence that we have recounted above supporting the court's implied finding that Manning's distinct crimes served different intents at different

times. Further, we cannot say Manning's series of acts against Doe were not individually criminal but only cumulatively so (*People v. Sanchez, supra*, 94 Cal.App.4th at p. 632); the jury convicted Manning of the distinct offenses of assault, criminal threats, rape and trafficking for his conduct. In *Sanchez*, the court pointed out in the context of applicability of a unanimity instruction that such an instruction is not required where "multiple acts constitute one discrete criminal event." (*People v. Sanchez*, at p. 631.) Here, Manning engaged in multiple acts amounting to multiple discrete criminal events, and thus he does not meet the *Sanchez* test on which he relies.

Finally, the possibility that human trafficking within the meaning of section 236.1, subdivision (b) may be a continuing offense<sup>10</sup> does not compel a different conclusion for

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<sup>10</sup> Manning suggests human trafficking should be considered a continuing offense due to its "requirement of 'substantial and sustained restriction' " of the victim's liberty. Whether a particular violation of law is a continuing offense depends on the express statutory language and also if " 'the nature of the crime involved is such that [the Legislature] must *assuredly* have intended that it be treated as a continuing one.' " (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 526, citing *Toussie v. United States* (1970) 397 U.S. 112, 115, *italics added*, amended by statute on another ground as stated by, e.g., *United States v. Martinez* (10th Cir. 1989) 890 F.2d 1088, 1091-1092.) *Wright* emphasized that the doctrine " 'should be applied in only limited circumstances . . . .' " (*Wright*, at p. 528.) Here, we observe from the statutory language that the deprivation or violation of personal liberty for a violation of section 236.1, subdivision (b) may "include[]" a "substantial and sustained restriction" of a victim's liberty via force, fear or violence (§ 236.1, subd. (h)(3)) with the intent to persuade or encourage the victim to become a prostitute (§ 266i, subd. (a)(2)). The statute is not limited to those circumstances however; it does not *require* an ongoing or continuous deprivation of the victim's liberty, and thus "[b]y its terms" it does not "expressly state a continuing offense." (*Wright*, at p. 526.) Manning does not address the broader nature of the offense other than to say the offense "cannot be committed in a blink of an eye" but requires a course of conduct. A crime may or may not be a continuing offense depending on the factual scenario. (See *People v. Leonard, supra*, 228 Cal.App.4th at p. 490.) In *Leonard*, this court held that while pandering by encouragement *can* be an ongoing

purposes of precluding punishment under section 654. This court reached such a conclusion in *People v. Leonard*, *supra*, 228 Cal.App.4th 465, in which the panel addressed defendants' arguments that their convictions for assault and/or criminal threat should have been stayed under section 654 based on convictions for pandering, which the defendants argued was a continuing and ongoing offense. (*Id.* at pp. 499-500.) We held that while pandering could be a continuous and ongoing offense, substantial evidence supported a finding that the defendants' pandering course of conduct had ceased by the time of the assaults and threat and thus section 654 did not apply. (*Id.* at pp. 499, 501.) Here, the court could reasonably conclude based on the evidence in this case that Manning's efforts to traffic Doe did not commence until *after* the other crimes were committed pursuant to different objectives. Like *Leonard*, on these facts, applying section 654 is not appropriate.

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offense, that does not necessarily mean that crime must be charged as a single ongoing offense under all factual scenarios. (*Ibid.*) The section 236.1, subdivision (b) offense does not require the completed crime of pandering, only the intent to "effect or maintain" that crime. We cannot say a crime violating section 236.1, subdivision (b)—in which a person can theoretically in a moment deprive another of their liberty via force or fear with the intent to pander by simply locking them in a room and threatening them with bodily harm if they don't act as a prostitute—is one that *necessarily* presents an ongoing condition akin to a possession offense. (See *People v. Bland* (1995) 10 Cal.4th 991, 999 [drug possession is a continuing offense that "extends through time"]; *People v. Keehley* (1987) 193 Cal.App.3d 1381, 1385 [unauthorized possession of food stamps].) Manning's arguments do not persuade us the Legislature *assuredly* intended all violations of section 236.1, subdivision (b) to be continuing offenses. (*Wright*, at p. 526.)



## DISPOSITION

The judgment is modified to vacate Manning's count 2 conviction for felony false imprisonment and stay under section 654 Manning's count 6 sentence for kidnapping for rape. As so modified, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.